UNITED NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 719

Case No. 799: KARTSEV

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas at the request of Vladimir Petrovich Kartsev, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 5 June and 15 July 1994, the time-limit for the filing of an application to the Tribunal;

Whereas, on 15 July 1994, the Applicant filed an application containing pleas which, in part, request the Tribunal:

"(a) To find and rule ... that the unilateral breach of [his] contract [of employment of 16 July 1991] by the Administration was arbitrary and capricious;

(b) To find and rule, alternatively, that, ..., the Administration wrongly decided not to extend the Applicant's fixed-term appointment;

(c) To find and rule that the decision ... that the Applicant be considered on secondment was wrongful ...;

(d) To find and rule that the decision ... not to recognize the Applicant's entitlement to a three-year contract, or, alternatively, not to extend the Applicant's fixed term appointment, was flawed by the intrusion of prejudice and other extraneous factors and marred by irregularities in procedure;

(e) To find and rule that the Joint Appeals Board erred ... in failing to find that the Applicant was ... entitled to immediate reinstatement and reimbursement of lost earnings for the period since his separation;

(f) To order the Applicant's immediate reinstatement at the D-2 level with [appropriate] payment of full salary and applicable allowances and benefits ... from the date of his separation from service to the date of reinstatement;

(g) To award the Applicant additional appropriate compensation ... for the actual, consequential and moral damages suffered ...;

(h) To fix, pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at two years' net base pay ...;

(i) To award the Applicant, as costs, the sum of $2,500."

Whereas the Respondent filed his answer on 15 March 1995;

Whereas the Applicant filed written observations on 28 June 1995;

Whereas, on 6 November 1995, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant, a national of the former Union of Soviet Socialist Republics (USSR) entered the service of the United Nations on 11 November 1989, on a two-year fixed-term appointment, at the D-2 level, as Director of the Publishing Division, Department of Conference Services (DCS). His appointment was subject to the special condition that he was "on secondment from government of USSR".

On 12 July 1991, a Personnel Officer, Office of Human Resources Management (OHRM), informed the Applicant that "based on the needs of the Organization and your performance, the Assistant Secretary-General for Human Resources Management has approved the

recommendation of the Department of Conference Services that you be offered an extension of your fixed-term appointment from 11 November 1991 through 10 November 1994, subject to medical clearance". She also asked the Applicant whether he preferred that his contract be extended on secondment from his Government. In a reply dated 16 July 1991, the Applicant accepted the offer, stating: "Not being a state employee, I am not interested in benefits offered by the secondment system. I would accept secondment only in the case where my opportunity to serve the U.N. would be linked unconditionally with my service on a secondment basis."

On 23 August 1991, the Personnel Officer informed the Applicant that the Assistant Secretary-General for Human Resources Management had again reviewed, with the Under-Secretary-General for Conference Services and Special Assignments, the decision to extend his contract and, "based on the needs of the Organization and [his] service record", had decided to offer him a one-year extension "on a secondment basis, from 11 November 1991 through 10 November 1992." On the same date, the United Nations wrote to the Permanent Mission of the former USSR to the United Nations, asking for the Government's agreement to extend the Applicant's appointment on secondment.

On 4 September 1991, the Permanent Mission of the former USSR consented to the extension of the Applicant's secondment for one year. The Applicant was offered a fixed-term appointment for one year. The Letter of Appointment stated as a special condition that:

> "This is a fixed-term appointment on secondment from Government service. The conditions governing appointments with the United Nations are set out in this Letter of Appointment. The conditions governing your right to return to Government service are specified in the communication dated 4 September 1991 from the Permanent Mission of the Union of Soviet Socialist Republics to the United Nations which is attached to this Letter of Appointment. By signing this Letter of Appointment, you specifically acknowledge that you have agreed to serve the United Nations on secondment

from the service of your Government on the conditions specified in this Letter of Appointment and its attachment."

On 17 September 1991, the Applicant wrote to the Assistant Secretary-General for Human Resources Management, asking him to confirm the terms of the original offer of a three year extension of his appointment. In his reply, dated 8 October 1991, the Assistant Secretary-General for Human Resources Management stated that since the Applicant's appointment was at the D-2 level, the matter of its extension was subject to consultation with the Executive Office of the Secretary-General, which had decided to grant him a one year extension.

On 23 December 1991, the Applicant wrote to the Secretary-General, asking him to "kindly reconsider my contractual situation, as a private citizen of Russia and not on alleged secondment from the Government ... and authorize the extension of my fixed-term appointment for three years ... to 10 November 1994." On 27 January 1992, the Assistant Secretary-General for Human Resources Management informed the Applicant that the initial offer of appointment had been sent to him "in error ..., before the necessary consultations with the Executive Office of the Secretary-General." He regretted the confusion that might have been caused. As regards the matter of secondment, he stated: "Based upon your statements, the Organization was correct in offering you an appointment on a secondment basis".

On 23 October 1992, DCS recommended a one-year extension of the Applicant's contract. Pending a decision on that recommendation, the Applicant was given an interim extension, from 11 November 1992 to 31 December 1992, also on secondment from Government service. It was signed by the Applicant on 13 November 1992.

On 17 December 1992, the Under-Secretary-General for Administration and Management wrote to the Secretary-General, as follows: "I understand that in connection with the Secretary-General's recent approval of the restructuring of the Office of

Conference Services, Department of Administration and Management, the post of Director, Publishing Division, is to be eliminated". He therefore recommended that the Applicant's appointment be extended for a final three month period, through 31 March 1993. The last Letter of Appointment does not contain any reference to secondment.

On 26 January 1993, the Applicant requested the Secretary-General to review the decision not to extend his appointment beyond 31 March 1993. On 15 March 1993, he lodged an appeal with the Joint Appeals Board (JAB) requesting a suspension of action on the decision not to extend him. On 23 March 1993, the JAB recommended a suspension of action to permit consideration of the substance of the appeal while the Applicant was still a staff member. The Secretary-General did not accept this recommendation. The Applicant separated from service on 31 March 1993. He was granted a Special Service Agreement as a consultant during April 1993.

The JAB adopted its report on 11 November 1993. Its considerations and recommendation read as follows:

> "Considerations
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> 14. Having agreed with the Appellant that (a) as of 16 July 1991 he had a valid contract with the Organization for a three-year extension to his fixed-term appointment and, (b) the Administration erred in deciding that he was on secondment from his Government, the Panel, nevertheless, noted that he did not appeal in a timely fashion after receipt of [the Assistant Secretary-General for Human Resources Management's] letter of 27 January 1992, nor did he offer any grounds which would justify a waiver of the time-limits. The Panel agreed, therefore, with Respondent that that part of the appeal dealing with these issues was not receivable.
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> 15. The Panel then considered the more recent decision not to extend Appellant's fixed-term appointment beyond 31 March 1993. The Panel noted that this decision was based on a restructuring of the then Department of Conference Services and that the Secretary-General has a wide degree of discretion in making such organizational arrangements. It agreed that there was no basis to Appellant's claim that he

was denied due process because he was not given the opportunity to comment on or review the restructuring decision. It also agreed that he had failed to produce any evidence that the decision to abolish his D-2 post was based on anything but organizational considerations.

16. Given Appellant's qualifications and performance, the Administration could well have made a greater effort to place him at the D-1 level as he had requested. It had, however, no obligation to do so. Nor, given the clearly stated conditions of fixed-term appointments - signed by Appellant on several occasions, did it have any obligation to extend his appointment at the D-2 level, once the post of Director, Publishing Division ceased to exist.

Recommendation

The Panel recommends that the appeal be rejected."

In his dissenting opinion, one member of the JAB recommended that "the Appellant be compensated by paying him his net base salary for 19 months and 10 days covering the unfulfilled term of his original three year contract from 1 April 1993 to 10 November 1994 in accordance with the jurisprudence of the Tribunal in Judgements No. 106: Vasseur (1967), No. 195: Levcik and No. 338: Moser (1987)."

On 7 December 1993, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the majority recommendation and the dissenting opinion.

He has noted the Board's finding that certain issues contained in your appeal are not receivable by the Board. In regard to the issue which was considered receivable, he has noted the Board's conclusion that the Secretary-General had no obligation to extend your appointment beyond 31 March 1993.

The Secretary-General has decided to accept the recommendation of the Board that your appeal be rejected. The Secretary-General has accordingly decided to take no further action in your case."

On 15 July 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's initial offer of a three year extension of the Applicant's appointment and his acceptance thereof constituted a legally binding contract.

2. The Respondent's unilateral breach of that contract was arbitrary and void.

3. The Respondent's offer of a one year extension on a secondment basis was wrongful.

Whereas the Respondent's principal contentions are:

1. The Applicant's claims concerning the initial offer of a three-year extension of his appointment are time-barred.

2. The Applicant's claims concerning the determination of his secondment status are time-barred and contradicted by the Applicant's own actions.

3. The Applicant accepted a one-year extension of his appointment and is, therefore, estopped from challenging it now.

4. Reorganization of an office falls within the discretionary powers of the Secretary-General and can only be challenged if the decision is tainted by prejudice or improper motive.

5. The Applicant had neither the right nor any expectancy of continued employment beyond the expiry of his fixed-term appointment.

The Tribunal, having deliberated from 2 to 21 November 1995, now pronounces the following judgement:

I. This is an appeal from a decision dated 7 December 1993, by the Secretary-General, accepting the Joint Appeals Board (JAB) recommendation to reject the Applicant's appeal.

The Applicant claims that the Respondent's initial offer of a three-year extension of his appointment and his acceptance of that offer on 16 July 1991, constituted a legally binding contract. The subsequent offer of a one year extension, on a secondment basis, is therefore alleged to have been wrongful and to have constituted a partial fulfilment of the original three year contract. The Applicant further argues that the Respondent's decision not to extend his fixed-term appointment was based on the intrusion of prejudice and other extraneous factors and was marred by irregularities in procedure.

II. Regarding the validity of the Respondent's offer of July 1991, the Respondent claims that this offer was made erroneously, and that the Applicant was informed, on 23 August 1991, of the decision to offer him a one-year extension of his appointment. Following the Applicant's request for clarification, the Administration responded, on 8 October 1991, that since he held a position at the D-2 level, his appointment was subject to consultation with the Secretary-General. As a result thereof, it had been decided to grant him a one year extension. At no time, after 23 August or 8 October 1991, when the Applicant had received a clear communication of that decision by the Administration on the extension of his appointment, did he seek a timely administrative review of the decision. Instead, on 25 October 1991, he signed, without qualification, the Letter of Appointment which provided for a one year extension. By this formal act, the Applicant may be taken to have acquiesced in the situation.

III. Staff rule 111.2(a) of the United Nations Staff Regulations and Rules provides, inter alia:

> "A staff member wishing to appeal an administrative decision, pursuant to staff regulation 11.1, shall, as a first step, address a letter to the Secretary-General, requesting that the administrative decision be reviewed; such a letter must be sent within two months from the date the staff member received notification of the decision in writing."

Following a request by the Applicant to the Secretary-General to authorize the three year appointment, the Administration stated, by letter of 27 January 1992, that the initial offer had been in error. The Tribunal finds that, at the very latest, it would be from this date, 27 January 1992, when the Applicant received an unequivocal written response from the Secretary-General, that the time limit for an appeal had to be measured. Having failed to act within a two month period, from 27 January 1992, the Tribunal concludes that the Applicant's plea on this issue is time-barred.

IV. The Applicant claims that the Respondent's decision to consider him on secondment negatively influenced his decision-making when determining whether to grant him a three year extension. However, based on the Applicant's conduct, it is difficult to see how he can substantiate this claim. Upon being informed of his one year extension, the Applicant immediately consulted with the Permanent Mission of the Union of Soviet Socialist Republics to the United Nations. In his attempts to obtain the three year extension, he signed a three year secondment agreement with the Government. It was never clearly explained by the Applicant in his submissions how the support he received from his Government, in agreeing to the three year period, prejudiced his chances with the Administration. On the contrary, it appears that the Applicant, in seeking the approval of his Government, was attempting to use this support as a means of influencing the Administration to grant him a three year fixed-term contract. In any event, the Tribunal also finds that the Applicant's claim regarding his secondment status is time-barred since it was not the subject of a timely appeal.

V. When the Applicant was offered the one year extension, on 25 October 1991, he signed a Letter of Appointment. Again, on 13 November 1992 and on 5 January 1993, when his appointment was extended, he signed further Letters of Appointment. Since the Applicant failed to show any evidence of coercion or duress placed on him by the Administration, he is bound by the terms and conditions of these Letters of Appointment, including the duration of each appointment. It is clear to the Tribunal that the Applicant could have refused these appointments at the times they were offered. Having accepted their terms, he cannot now seek to rely on the original offer of a three year extension. (Cf. Judgements No. 336, Maqueda Sanchez (1984); No. 500, Pappas (1990); No. 506, Bhandari (1991); No. 559, Vitkovski and Rylkov (1992)).

VI. The Applicant submits that the decision of the Administration to reorganize the Department of Conference Services (DCS), and consequently to abolish his post, was in part motivated by a desire to remove him from office. He further argues that he was denied due process and that the Respondent's discretion in this case was exercised with caprice, prejudice and unfairness. Indeed, a staff member is entitled to challenge the Respondent's decision to reorganize if he can prove that it was vitiated by prejudice or some other improper motive. (Cf. Judgement No. 350, Raj (1985)). In the present case, however, the Tribunal accepts the JAB's conclusions that there was no basis for the Applicant's claim that he was denied due process and that the Applicant did not satisfy the burden of proving that the decision to reorganize the Department and abolish his post was improper or based on anything other than organizational considerations.

VII. The Administration has complete discretionary powers to determine whether a reorganization is needed. The Tribunal does not have the authority to examine how the reorganization was undertaken

or if better results would have been obtained if the reorganization did not take place. (Cf. Judgements No. 117, Van der Valk (1968); No. 350, Raj (1985); No. 412, Gross (1988)). According to the facts of this case, the reorganization of the Secretariat was a publicly announced policy goal of the Secretary-General. The reorganization of DCS was to be part of it. It has been held by the Tribunal that the mere fact that "a reorganization may hinder the prospects or in any way affect the career of a staff member does not necessarily point to the existence of discrimination or improper motives in the Administration and thus, does not in itself give grounds for any claim against the decision taken." (Cf. Judgement No. 350, Raj (1985)).

VIII. With respect to the Applicant's claim that he had a legal expectancy of continued employment based on his record, it too must fail. The Tribunal notes that in accordance with staff rule 104.12(b), each Letter of Appointment that the Applicant signed specifically stated the duration of the appointment and that the appointment carried no expectancy of renewal. It has been the Tribunal's consistent jurisprudence that, absent exceptional circumstances (not present here), employment with the Organization ceases on the expiration date of a fixed-term appointment and that moreover, even in the light of outstanding performance by the staff member, no legal expectancy of renewal would be created. (Cf. Judgements No. 173, Papaleontiou (1973); No. 205, El-Naggar (1975); No. 368, Roy (1986); No. 427, Raj (1988); No. 440, Shankar (1989); and No. 506, B. (1991)).

IX. In conclusion, the Tribunal finds that:

(1) The Applicant's claims regarding the initial offer of a three year extension of his appointment and his status concerning his secondment, are time-barred.

(ii) The Applicant had no legal right to the renewal of his appointment, and failed to prove the existence of extraneous considerations or improper motives regarding the Respondent's decision to reorganize DCS.

X. Based on the above, the Tribunal rejects the application in its entirety.

(Signatures)

Jerome ACKERMAN
President

Francis SPAIN
Member

Mayer GABAY
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary